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Docket No. 82-290

IN THE

Supreme Court of the United States

October Term, 1982

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Appellant,

v.

THE FINANCE ADMINISTRATION AND THE TAX COMMISSION OF THE CITY OF NEW YORK and ROBERT ABRAMS, Attorney General of the State of New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

Brief of the County of Nassau as *Amicus Curiae*

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Question Presented.

May a legislature amend an evidentiary statute, utilized specifically for real property tax review proceedings, by excising a previously permissible evidentiary tool in "special assessing" units within the state without denying a taxpayer in such district Equal Protection or Due Process rights guaranteed by the Fourteenth Amendment of the Constitution of the United States?

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ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

Brief of the County of Nassau as *Amicus Curiae.*

Interest of Nassau County.

Issues of vital concern to Nassau County, New York, are raised in the instant proceeding. As described in Appellant's Jurisdictional Statement (pp. 2, 3) the challenged

Real Property State Statute (L. 1981, ch. 1057, §7) excises a previously permitted evidentiary ratio tool in those "special" assessing units defined in the statute (§1801, ch. 1057). To date, only the City of New York and the County of Nassau qualify as "special" assessing units under the statute (see Appellant's Jurisdictional Statement, p. 3).

Inasmuch as the evidentiary ratio issue can and will substantially affect the Treasury and Assessment Roll of the County of Nassau, the County Executive in the interest of fair and effective representation for the County's 1,300,000 residents, has directed the County Attorney to sponsor this brief in the instant matter on behalf of the residents of the County of Nassau under Rule 36(4) of this Court.

Summary of Argument.

It is the position of Nassau County that the sound legal and constitutional principles enunciated in *Colt Industries* and *Equitable Life* effectively put to rest any claim to federal constitutional infringement.

Similarly, no litigant has a vested right to a particular evidentiary tool. It is within the particular purview of the state legislature to pass on evidentiary issues of this type. Indeed, all the legislature has done in this instance is to reinstate previously constitutional evidentiary methods of proving ratio for review of tax assessments (N.Y. Sess. Law, ch. 942, L. 1961, Former Tax Law §293). Due process violations are not premised on the fact that a legislature has excised the more convenient evidentiary tool from procedural evidentiary statutes.

Statutory differentiations based upon population density, numbers of real estate parcels within assessing units

and other factors are relevant criteria to be considered when drafting legislation affecting various and distinguishable municipalities within the state.

No equal protection argument will lie when there are coherent and suitable (i.e., rational) reasons for a state to make such regional distinctions in taxing matters.

The Question is Not Substantial.

A. Introduction.

Ratio is an integral and necessary burden of proof petitioners must meet in order to prove their claim of overassessment by reason of inequality. An allegedly aggrieved taxpayer must first establish the applicable ratio of assessment to full value within the appropriate assessing unit. Next, he must prove the market value of his property. This value is then applied to the proven ratio to determine whether or not an overassessment exists. *Matter of Slewett & Farber v. Board of Assessors of the County of Nassau,* 54 NY 2d 547, 555, 446 N.Y.S. 2d 241 (1982).

Prior to 1961, proof of ratio was only permitted based upon the traditional sample parcel or actual sales methods (former Tax Law §293; see also *Matter of O'Brien v. Assessors,* 20 NY 2d 587, 595, 285 N.Y.S. 2d 243 [1967]). In 1961 the New York State Legislature permitted the use of the equalization rate established by the State Board of Equalization and Assessment (state rate), for the particular assessing unit, as some evidence of ratio. N.Y. Sess. Laws, L. 1961, ch. 942. However, petitioners could not *exclusively* rely on the state rates to prove ratio (*O'Brien, supra*). Subsequently, the Legislature amended the appropriate evidentiary statute to permit the use of the

state rates as the exclusive proof of ratio in an inequality proceeding (N.Y. Sess. Laws, 1969, ch. 302; *Ed Guth Realty, Inc. v. Gingold,* 34 NY 2d 440, 358 N.Y.S. 2d 367 [1974]).

The Legislature, because of the financial impact these state rates were having in many municipalities across the state, soured about the use of this evidentiary tool and beginning in 1979 attempted to excise the use of the state equalization rate as proof of ratio across the state. See N.Y. Sess. Laws, 1979, ch. 126. In 1981, the use of the state rates in "special" assessing units was eliminated. N.Y. Sess. Laws, 1981, ch. 1057.

The Court of Appeals of the State of New York, did not find any constitutional due process or equal protection infirmities concerning L. 1981, ch. 1057. *Colt Industries v. Finance Administrator,* 54 N.Y. 2d 533, 446 N.Y.S. 2d 237 (1982).

As a result, the within appeal ensued.

B. The Due Process question.

Appellant submits that the decision by the New York State Legislature to proscribe the use of state equalization rates as evidence and proof of inequality in Special Assessing Units works a denial of Equal Protection and Due Process as provided for in the Fourteenth Amendment. It is submitted that the change in a procedural rule of evidence does not work a denial of Equal Protection and Due Process to the Appellant. Further, the question presented by the Appellant is not a substantial federal question inasmuch as this Court has on prior occasions answered the question raised. Therefore, the appeal

should be dismissed for want of a substantial federal question and the judgment of the New York Court of Appeals affirmed.

It has long been recognized that due process will protect a vested cause of action from arbitrary interference *Pritchard v. Norton,* 106 U.S. 124, 132, 1 S. Ct. 102, 27 L. Ed. 104, 107 (1882). However,

> the appellant has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure. *Iowa C. R. Co. v. Iowa,* 160 U. S. 389, 393, 40 L. ed. 467, 469, 16 S. Ct. 344; *A. Backus Jr. & Sons v. Fort Street Union Depot Co.,* 169 U. S. 557, 571, 42 L. ed. 853, 859, 18 S. Ct. 445; *Crane v. Hahlo,* 258 U. S. 142, 147, 66 L. ed. 514, 517, 42 S. Ct. 214; *Hardware Dealers Mut. F. Ins. Co. v. Glidden Co.,* 284 U. S. 151, 158, 76 L. ed. 214, 219, 52 S. Ct. 69.

Gibbes v. Zimmerman, 290 U. S. 326, 332, 54 S. Ct. 140, 78 L. Ed. 342, 347 (1933).

Moreover, state legislatures are permitted to change rules of procedure that have existed in the past and enact entirely new modes of procedure. *A. Backus, Jr., & Sons v. Fort Street Union Depot Co.,* 169 U. S. 557, 571, 18 S. Ct. 445, 42 L. Ed. 853, 859-60 (1897). As the Court in *Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co.,* 284 U. S. 151, 52 S. Ct. 69, 76 L. Ed. 214 (1931), recognized,

> . . .[t]he 14th Amendment . . . [does not] guarantee any particular form or method of state procedure.

> See *Missouri ex rel. Hurwitz v. North*, 271 U. S. 40, 70 L. ed. 818, 46 S. Ct. 384. In the exercise of that power and to satisfy a public need [the procedure by which rights may be enforced and wrongs remedied], a state may choose the remedy best adapted, in the legislative judgment to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard.

284 U. S., at 158, 76 L. Ed., at 219.

Thus, a state is free to regulate its procedure for enforcing rights and remedying wrongs. A state may change a procedural rule of evidence if an effective procedure is maintained. That another method may seem fairer or wiser or provide greater protection will not cause a procedure to run foul of the Fourteenth Amendment. *Snyder v. Massachusetts*, 291 U. S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674, 677 (1934).

The New York Legislature has preserved Appellant's right to petition for a review of its real property assessment through filing of a *certiorari* proceeding pursuant to Article Seven of the New York Real Property Tax Law (hereinafter cited as N.Y. RPTL). Thus, the situation of abolishing an existing cause of action is not before this Court. Nor is the Appellant denied access to the court in the first instance. *Cf. Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).

The legislature has seen fit, however, to change a procedural rule of evidence in *certiorari* proceedings. Petitioners who seek review of their real property assessments

must prove inequality through use of the parcel selection method, the actual sales method or the State equalization rates. However, petitioners in Special Assessing Units (presently only New York City and Nassau County are such units) are not permitted to prove inequality by using the State equalization rates. N. Y. RPTL §720(3) (McKinney's). Therefore, Appellant may use the parcel selection method or actual sales method to prove inequality inasmuch as its property is located in New York City. It is alleged by Appellant that this procedure denies Due Process inasmuch as it is not effective.

Appellant goes to great length to point out the cost of using the parcel selection method or the actual sales method. Jurisdictional Statement of Appellant, pgs. 11-15. Yet, Appellant has failed to point out that petitioners can be reimbursed for the costs of proving inequality. N. Y. RPTL §716 (McKinney's). This is so as long as petitioner proves a ratio of inequality, i.e., percentage of full value at which property is assessed in the assessing unit, not in excess of the ratio specified in his demand. N. Y. RPTL §716(2) (McKinney's). The costs paid by the assessing unit include the fees of experts and attorneys. *Id.*

Indeed, the petitioner in *860 Executive Towers v. Board of Assessors of the County of Nassau,* 84 Misc. 2d 12, 374 N.Y.S. 2d 284, aff'd 53 A. D. 2d 463, 385 N.Y.S. 2d 604 (2d Dept. 1976), aff'd *sub nom. Pierre Pellaton Apts., Inc. v. Board of Assessors,* 43 N.Y. 2d 769, 401 N.Y.S. 2d 1013 (1977), did receive their costs for proving inequality, as did the petitioner in *Ed Guth Realty, Inc. v. Gingold,* 41 A. D. 2d 479, 344 N.Y.S. 2d 270 (4th Dept. 1973), aff'd 34 N.Y. 2d 440, 358 N.Y.S. 2d 367 (1974). Thus, petitioners in addition to being provided with access to the

courts for review of their assessments, are provided with a means to be reimbused for their costs once their evidentiary burden is met and proven. It strains credibility for Appellant to maintain that the procedure provided for by the legislature is not effective where the taxing authority will ultimately pay the costs of litigation.

Additionally, cost of litigation and temporary out of pocket expenses are not basis for Supreme Court review prior to final state determination. *Republic National Gas. v. Oklahoma,* 334 U.S. at p. 62 (1947).

The situation presented to this Court is not unlike that presented by change of venue in the federal courts. Initially, the plaintiff selects the place of suit. 28 U.S.C. §1391 (West). A motion for change of venue, of course, may then be filed. 28 U.S.C. §1404 (West). If said motion is granted, it is quite possible that one of the parties to the suit may experience inconvenience and greater expense to maintain suit. Yet, this Court has consistently held that this rule of procedure, even though it may cause greater expense, does not work a denial of due process. See *Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen,* 387 U.S. 556, 87 S. Ct. 1746, 18 L. Ed. 2d 954 (1967); *Ex parte Joseph Collett,* 337 U.S. 55, 69 S. Ct. 944, 93 L. Ed. 1207 (1949).

In the case at bar, the legislature of the State of New York provided that costs be paid alleviating much of the inconvenience faced by Appellant. It must be noted that Appellant herein has not alleged that it is incapable of proving ratio under the present conditions. Once Appellant establishes ratio other petitioners may, if they choose to do so, collaterally estop the assessing unit from challenging the rate. *Ed Guth Realty v. Gingold, supra;* see, *Israel*

v. Wood Dolson Co., Inc., 1 N.Y. 2d 116, 151 N.Y.S. 2d 1 (1956). It is clear that the law proceeds in an orderly fashion and provides due process to the Appellant and other petitioners who seek review of their real property assessments.

The decisional law of New York also makes clear that the State equalization rates for Nassau County have not been always been expertly arrived at. Nassau County has succeeded in challenging these rates and having them annulled. See, *County of Nassau v. State Board of Equalization & Assessment*, 80 A. D. 2d 9, 437 N.Y.S. 2d 793 (3d Dept. 1981). The County of Nassau is currently challenging the 1980 equalization rate as established for Nassau County. *County of Nassau v. State Board of Equalization & Assessment*, Supreme Court, Albany County, Index No. 1920/82. Thus, it is not unreasonable nor arbitrary for the legislature to decide that the State equalization rates for Nassau County do not provide the evidence best adapted to protect the interests of aggrieved taxpayers and the municipality.

Canigiani v. Board of Assessors of Nassau County, N.Y.L.J., July 9, 1981, at 13, col. 2 (Sup.Ct.Nassau Co., June 29, 1981), has little application to the case at bar (Jurisdictional Statement p.13). It should be pointed out to this Court that the County of Nassau therein refused to put on a direct case in light of the way that proceeding was commenced and considers the case procedurally and substantially defective.

The court therein refused to let this declaratory action take its normal procedural course. The County of Nassau was permitted no discovery, no pre-trial disclosure, no opportunity to attack the accuracy of the state rate (even

though some of those rates had already been annulled by orders of other courts, see p. 15 herein) and little opportunity even to prepare its own witnesses or brief relevant points of law. It goes without saying this matter is now under appeal and in light of the Court of Appeals holding in *Colt* on cost it is unlikely to withstand appellate scrutiny.

It should also be noted that at the time of this proceeding, an appellate court had already passed on the constitutionality of the law in question. *Slewett & Farber v. Board of Assessors*, 80 AD 2d 186, 438 NYS 2d 544 (1981).

This appeal does not present a substantial federal due process question. Prior case law holds that procedural rules may be changed by a state legislature. In this case, New York has changed a rule of procedure. The change must preserve the substantial right to redress by some effective procedure. In New York, Appellant may still prove inequality and can be paid the costs involved therein. Moreover, the ratio once determined under the new enactment may be used by other litigants as evidence of inequality via collateral estoppel in those years where the rates have been established pursuant to the new enactment. Finally, the history of litigation on the promulgation of State equalization rates for Nassau County and the State Board methodology as it affects Nassau County indicates that the legislature was reasonable and not arbitrary when it banned the use of these state rates in certain parts of the State.

C. The Equal Protection question.

The County of Nassau respectfully submits that the legislative plan in issue (RPTL Sec. 720[3]; L1981 ch 1057) which establishes a different evidentiary standard for

Nassau County and New York City from the rest of the state with respect to proving inequality does not violate the Equal Protection provisions of the Fourteenth Amendment.

It is axiomatic that the statute in question is evidentiary and is therefore remedial and procedural in nature. See *Yarras v. Kinnan,* 303 NY 224 (1951); *Wolf v. Assessor,* 308 NY 416 (1955); *O'Brien, supra.* The Legislature is, of course, empowered to change policy by suspending or modifying statutes of this type thereby changing prior statute or case law. Indeed, it is undisputed that the legislature has, in the past, modified this evidentiary statute to conform to their changing policy (see generally former Tax Law Sec. 293; N.Y. Sess.Laws 1961, ch 942; N.Y.Sess.Laws 1969, ch 302; N.Y.Sess. Laws 1979, ch 126; N.Y.Sess. Laws 1981, ch 1057).

Appellant does not seem to challenge this general proposition. Rather, appellant contends that the present enactment is repugnant to the equal protection and due process guarantees of the 14th Amendment. Such contention is specious.

This Court has historically held that regional distinctions made within a state are constitutionally permissible if founded on a rational basis. As long ago as 1880, this Court has held:

> "We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method

of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the 14th Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the 14th Amendment, there is no solid reason why there may not be such diversities in different parts of the same State." *Bowman v. Lewis,* 101 U.S. 22, 31,25 L.Ed. 989 (1880).

It should be noted that in 1880 the surrounding counties of New York City included the City of Brooklyn and Queens County which then included what is now Nassau.

The state's power to draw reasonable distinctions between political subdivisions within its borders has never been questioned, *Salsburg v. Maryland,* 346 US 545, 551-552 74 S.Ct. 280, 98 L.Ed. 281 (1954); *San Antonio Independent School District v. Rodriguez,* 411 US 1, 28 93 S.Ct. 1278, 36 L.Ed. 16,39-40 (1973). Appellants seem to suggest that the only distinction outlined within the new law, is one based solely upon population (see Jurisdictional Statement p. 18). Such is not the case. As the Court of Appeals of New York has pointed out, a rational basis for the distinction was not based upon both population density *and* diversity of property. *Colt Industries, supra,* 54 NY 2d, at 545. Other factors that would support the rational basis for the distinction are that Nassau County and New York City are one assessment jurisdiction as opposed from the rest of the state (except Tompkins County) and the huge number of parcels (approximately 400,000 in Nassau County and 700,000 in New York City) demand different treatment in these jurisdictions as opposed to the rest of the state.

Appellants place critical reliance on a quote from the Court of Appeals of New York in *J. A. Green v. Finance Administrator of the City of New York,* 56 NY 2d 363, 376 (1982) which purportedly gave substantive effect to a procedural statute (Jurisdictional Statement p. 18). A careful analysis of said quote and the authorities relied on by the Court of Appeals (*Simonson v. International Bank,* 14 NY2d 281, 289, 290 [1964]; 4 NY Jur 2d 501 Sec. 400), indicates the little relevance said quote has to this appeal.

Normally an appeal will be determined in accordance with the law at the time of an appellate review, 4 NY Jur.2d 501 Sec. 400. However, it will take a clear legislative mandate to apply new legislative enactments to

actions wherein the relevant proceeding has since past, *Simonson, supra,* 14 NY 2d, at 289, 290. The present evidentiary statute contains no language that would permit the court to apply it to cases where an evidentiary hearing has already taken place.

In *J. A. Green,* a hearing permitting the use of the state rates had occurred prior to the enactment of the new statute, see *J. A. Greene v. Finance Administrator,* NOR index No. 12468/71 Ventiara R. Kings Co., dec'd November 20, 1980. Without a clear legislative mandate to the contrary, it was absolutely permissible for the Court of Appeals to let stand the evidentiary holding in *J.A. Green* based on the hearing which took place prior to the new enactment. The "usual rule" of appellate review could not have applied in *J. A. Green* under the present evidentiary procedural statute.

Conversely, no evidentiary hearing had taken place in the case at bar. The Court of Appeals rationale in *J. A. Green* has no application, therefore, to the instant proceeding. In any event, the applicability and retroactivity of state evidentiary statutes are solely state matters not reviewable by federal courts. *Brinkerhoff-Faris Trust & Savings v. Walter O. Hill,* 281 US 673 50 S.Ct. 451, 74 L.Ed. 1107 (1930).

Appellants also place great reliance on the accuracy of the State Equalization Rate as evidence of ratio in a tax review proceeding placing it on an almost sacrosanct level. (Jurisdictional Statement p.15). While it is true that in years past the courts of this state have approved the use of this rate as evidence of ratio in real property tax review proceedings, *Guth Realty Inc. v. Gingold,* 314 NY2d, at 449-50, it is also true that the courts of this state have been recently rejecting the accuracy of these rates and have

voided these rates as they have been promulgated for Nassau County for the past several years, *County of Nassau v. State Board of Equalization & Assessment*, Appellate Division, Third Dept., #37299, 1981 (1977 state rate); *County of Nassau v. SBEA*, Sup. Ct. Albany Co. Index No. 2447/80, 1981 (1978 state rate); *County of Nassau v. SBEA*, Sup. Ct. Albany Co. Index No. 1700/81, 1981 (1979 state rate); *County of Nassau v. SBEA*, Sup Ct. Albany Co, Pitt, J., dec'd Nov. 24, 1981 (1977 reinstituted rate).

Under these circumstances it is specious to suggest that the State Equalization Rate is "the only viable evidence" to prove ratio (Jurisdictional Statement p.19).

Additionally, those cases relied on by Appellant are inapplicable to the case at bar. It is uncontroverted herein that the Appellate courts of the State of New York will, by right, review assessments and determinations made below, unlike the situation in *Hillsborough Township v. Cromwell*, 326 US620, 625, 626, 66 S.Ct. 445, 90 L.Ed. 358 (1945). In this regard, there is no doubt as to the effectiveness of the state remedy in the case at bar.

Similarly, the particular issue of unequal assessments raised in *Sioux City Bridge Co. v. Dakota*, 260 US441, 43 S.Ct. 190, 67 L.Ed. 340 (1922), and the unique remedy afforded to aggrieved taxpayers therein by the state (raising other assessments rather than lowering the incorrect assessment to reach equality) is not before this Court and has little relevance to the case at bar.

Nor is there a claim of "intentional systematic undervaluation" of property "in the same class" as the property in question *Sunday Lake Iron Co. v. Wakefield*, 247 US 350, 38 S.Ct. 495, 62 L. Ed. 1154 (1918).

The holdings of this Court are clear and unambiguous. A rational basis exists to constitutionally justify the actions of the Legislature in enacting the law in question (L.1981 ch 1057, RPTL 730[3]). There is no constitutional infirmity in enacting such legislation.

Conclusion.

For all the foregoing, it is respectfully submitted that this Court dismiss this appeal for want of a substantial federal question and affirm the judgment of the New York Court of Appeals below.

Respectfully submitted,

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